IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-920

JOSEPH ANUSZEWSKI AND RONALD GUTOWSKI,
Petitioners,

v.

DYNAMIC MARINERS CORP., PANAMA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Were the decisions of the district court and court of appeals below applying land-based standards consistent with the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §§ 901 *et seq.* (1976 Supp.) (hereafter Longshoremen's Act)?

STATEMENT OF THE CASE

There are numerous factual omissions in Petitioners' Statement of the Case. They are particularly significant because each of them was specifically referred to by the district judge below and, coupled with current land-based negligence standards, formed the basis for his carefully reasoned opinion which was affirmed, *per curiam,* by the Court of Appeals for the Fourth Circuit.

In the court below, there was an agreed Statement of Facts contained in Appellants' (Petitioners' herein) brief. For convenience, that agreed statement is contained in full in Respondent's Appendix to this brief (Res. App. 1a, *et seq.*)*, but only the pertinent factual omissions will be referred to hereafter together with references both to the Agreed Statement of Facts and the opinion of the learned district judge.

Petitioners correctly state that during the discharge of the TARPONA a member of the vessel's crew was present "for the purpose of preventing pilferage" and that one or more other members of the crew were "in a position to see that the beams were unfastened." Br. 6. Petitioners, however, failed to state that on the first day of discharging the vessel, February 17, the longshoremen had not only observed and discussed among themselves the absence of any means of securing the beams in place but had, in fact, complained to their gang carrier and their foreman, both of whom were employees of the stevedoring company. The stevedoring company's safety man was not aboard the vessel. If he had been, and had performed his job, the failure to achieve a condition of safety "would seemingly have been obviated." Res. App. 3a; Dist. Ct. Op., Pet. App. 2a, 3a.**

* References to Respondent's Appendix are designated "Res. App. (page nos.)."

** References to District Judge Kaufman's opinion below, reproduced in Petitioners' Appendix, are designated "Pet. App. (page nos.)."

Following the complaints to their gang carrier and foreman, the longshoremen were told by their foreman to continue to work and that the situation would be corrected. In fact, the situation was not corrected either on the first day of work, February 17, or on February 18 through the time of the accident. Res. App. 3a; Pet. App. 3a.

Within a half block of the vessel, there was a gear locker belonging to the stevedoring company which contained rope and probably nuts and bolts which could have been obtained for use in securing the beams in place. Moreover, on the vessel itself there was a nearby chain locker containing items which could have been used to secure the beams in place. Res. App. 4a; Pet. App. 3a, 4a.

Finally, no one from the vessel was asked to correct the situation. Res. App. 4a; Pet. App. 3a, 4a.

ARGUMENT

Hereafter, Respondent will reply directly to the arguments advanced by the Petitioners commencing with the heading "Reasons for Granting the Writ" (Br. 8), adopting, for convenience, the same numerical order used by Petitioners.

1. THE DECISION BELOW IS NOT IN CONFLICT WITH *NAPOLI v. [TRANSPACIFIC CARRIERS, ETC.] HELLENIC LINES,* 536 F.2d 505 (2d CIR. 1976).

In relying on an alleged conflict between the decision below in the case at bar and *Napoli,* Petitioners have ignored the fundamental difference in the underlying facts. In this case, Anuszewski and Gutowski were longshoremen working for an independent stevedoring company. In *Napoli,* the injured longshoreman was an employee of the vessel owner, Hellenic Lines, which acted as its own stevedore. The Second Circuit, following *Reed v. The YAKA,* 373 U.S. 410 (1963), correctly held that he was nevertheless entitled to bring

a third-party claim against his employer pursuant to the 1972 Amendments to the Longshoremen's Act.

Petitioners, however, maintain the following language from *Napoli* is in conflict with the Fourth Circuit's decision herein:

> Moreover, we do not think that instructions which flatly negate the duty to protect against obvious danger properly portray the present-day obligations owed by a landowner to one whom he invites upon his premises.

Br. 8; 536 F.2d at 508. But the crux of the *Napoli* decision reversing the district court is contained in the sentence omitted from the Petitioners' brief which immediately precedes the language relied upon:

> However, a charge which relieves a shipowner of liability for a dangerous condition which was "known to the stevedore or to any of its employees" *is clearly inappropriate where the shipowner, itself, is the stevedore.*

536 F.2d at 508 (emphasis added). Thus, *Napoli* was not intended to apply to situations in which the shipowner and stevedore are *separate* parties, as in the instant case.

Apart from this fundamental distinction which accounts for any seeming conflict between the Fourth Circuit's decision below and the Second Circuit's decision in *Napoli,* the injuries in the two cases arose under significantly different circumstances. Napoli, a deckman, was injured when he fell from some unsecured plywood boards resting on top of a deck load of drums, upon which he was obliged to stand to perform his duties. There was snow both on top of and beneath the plywood. The evidence was conflicting as to whether he slipped on the plywood or the plywood slipped on the drums, and whether the plywood had been placed on the drums by the ship's crew or by the longshoremen.

The Second Circuit reversed a jury verdict for the defendant because of error in the following portion of the jury charge:

> "There is no duty on the part of the ship owner to give the longshoremen notice of an obvious danger, or of a danger which would have been apparent to a reasonably prudent person exercising ordinary care under the circumstances shown by the evidence in the case."
>
> . . . . .
>
> "Now, if you find that the condition complained of by the plaintiff, that is permitting snow to accumulate under the plywood which caused the plywood to slip out from under him was known to the stevedore or to any of its employees, including the plaintiff, or if this should have been observed, then the ship owner owes no responsibility to warn a longshoreman of the open condition. If you find such then you can not find that the defendant was negligent and you must return a verdict for the defendant."

Id. at 507-08.

In commenting upon the portion of the jury charge it considered erroneous, the Second Circuit noted it was obviously the intent of the district court "to instruct the jury in accordance with the traditional rule of land-based negligence which is in substance that there is no obligation to warn an invitee of dangers which are known to him or which are so obvious that he may reasonably be expected to discover them himself." *Id.* at 508. The Second Circuit then cited with approval Dean Prosser[1] as well as earlier district court opinions properly applying the rule. Thus, it approved the same

[1] W. Prosser, *The Law of Torts* § 78, at 459 (2d ed. 1955). While numbered differently from the current citation, § 61 (4th ed. 1971), employed by District Judge Kaufman in the case at bar, both sections concern the duty owed by owners and occupiers of land to invitees. The newer edition, while consistent with the older one, contains a more extensive discussion of the care required.

land-based standards first applied by the Fourth Circuit in *Bess v. Agromar Line*, 518 F.2d 738, 741 (4th Cir. 1975), and later applied by the same court in the instant litigation. Pet. App. 23a.

But Petitioners maintain that *Napoli* conflicts with the opinion below and in support of their contention rely upon the following language:

> Where dangers are unreasonable, their obviousness, standing alone, should not necessarily relieve a defendant of all responsibility for their presence. Although the invitee (or in this case the employee) may be under a duty to avoid harm likely to result to him from open and obvious dangers, he *may not be in a position fully to appreciate the risk or to avoid the danger* even though aware of it.

536 F.2d at 508; Br. 9 (emphasis Respondent's). It is apparent from this language that the Second Circuit concluded the injured longshoreman was in no position either to appreciate the risk or avoid the danger which brought about his injury. This is fortified by its recitation of the particular factual situation with which it was faced in *Napoli:*

> In the present case, there was evidence from which a jury might conclude that the ship should reasonably have anticipated that Napoli would not be able to avoid the danger despite its obviousness. The thrust of Napoli's testimony was that he had to stand on the plywood in order to carry out his duties of giving signals to the winchmen.

536 F.2d at 509. Such cannot be said of the Petitioners. The undisputed facts upon which the district court below based its finding in Respondent's favor are that:

(1) Petitioners and their fellow workers were fully aware of the unsecured beams from the day before their accident through the time of the accident itself and had complained to their superiors. Pet. App. 2a, 3a. Clearly, they *were* "in a position fully to appreciate the risk or to avoid the danger . . . ." 536 F.2d at 508;

(2) Stevedoring personnel were responsible for removing beams, not ship's personnel, and the decision to leave an unsecured beam in place was that of the stevedore. Pet. App. 2a;

(3) Items which could have been used to secure the beams were readily available aboard the vessel in a nearby chain locker, or in a gear locker belonging to the stevedoring company only a half block away. Pet. App. 3a; and

(4) The condition complained of could have been eliminated by the removal or securing of the beam by the stevedoring company. Pet. App. 5a.

The district court below, on the basis of the foregoing facts, held:

> In this case the plaintiffs and the members of their gang did discover and realize the danger. Further, the shipowner could reasonably have expected that the longshoremen would have discovered the unsecured beams and would have protected themselves by removing all of those beams or by fastening them.

Pet. App. 9a. Removal of the beams was within the scope of the stevedore's duties. It was the expert in discharging cargo. Since the stevedoring company in full control of the discharging neither removed the beam nor complained to the ship's crew (Pet. App. 2a-3a), the natural inference is that the stevedore did not believe the unfastened beam posed an unreasonable risk to the longshoremen working in the hold. To require vessel owners to second-guess stevedores under these circumstances would be totally inconsistent with the view, frequently stated in post-Amendment cases, that a vessel owner is under no obligation to supervise the operations of a competent stevedore hired as an independent contractor. *See Ramirez v. Toko Kaiun K.K.*, 385 F. Supp. 644, 653 (N.D. Cal. 1974); *Slaughter v. SS RONDE*, 390 F. Supp. 637, 646-47 (S.D. Ga. 1974),

aff'd, 509 F.2d 973 (5th Cir. 1975); *Citizen v. M/V TRITON,* 384 F. Supp. 198, 201 (E.D. Tex. 1974); *Fedison v. Vessel WISLICA,* 382 F. Supp. 4, 6 (E.D. La. 1974); *Lucas v. "Brinknes" Schiffahrts Ges. Franz Lange G.m.B.H. & Co., K.G.,* 379 F. Supp. 759, 768 (E.D. Pa. 1974). The same principle had been expressed as well in pre-Amendment cases. *See Shephard v. SS NOPAL PROGRESS,* 497 F.2d 963, 965 (5th Cir. 1974), *cert. denied,* 420 U.S. 937 (1975); *Filipek v. Moore-McCormack Lines,* 258 F.2d 734, 739 (2d Cir. 1958), *cert. denied,* 359 U.S. 927 (1959); *Wyborski v. Bristol City Line of Steamships, Ltd.,* 191 F. Supp. 884, 889-90 (D. Md. 1961).

Just as the Second Circuit in *Napoli* recognized the correctness of instructing a post-Amendment jury under traditional rules of land-based negligence, 536 F.2d at 508, District Judge Kaufman applied the same traditional rule and found that the danger was open and obvious, that it was known to Petitioners, and that Respondent reasonably believed they would protect themselves accordingly. The Fourth Circuit approved the district court's choice of the Restatement standard and found that "its ultimate finding and conclusion upon the issue of liability is amply supported by the record." Pet. App. 24a. As the standards applied by the Second and Fourth Circuits are identical, there is no conflict between the two opinions.

2. THE COURT OF APPEALS FOR THE FOURTH CIRCUIT MADE NO MISSTATEMENT OF FACTS IN REACHING ITS DECISION.

In rendering its *per curiam* affirmance of the district court, it was unnecessary for the appellate court to repeat each and every fact found by the lower court. In approving the district court's reliance on the Restatement (Second) of Torts § 343 (1965), the court of appeals necessarily took into account that the vessel owner was aware of the condition of the beams which might bring

about injury, but that under the amended Longshoremen's Act there was no duty on the part of the shipowner to take any action respecting them when it was quite apparent that the danger would not only be discovered by the stevedore but was, indeed, discovered and was of the stevedore's own creation when it elected to remove only three of the four beams in the hatch.

3. THE DECISION BELOW DOES NOT UNDERMINE COMPLIANCE WITH APPROPRIATE SAFETY REGULATIONS.

Petitioners contend that the opinion below imposes no duty on vessel owners to correct violations of the Safety and Health Regulations for Longshoring, 29 C.F.R. §§ 1918.1 *et seq.* (1976). However, the Safety and Health Regulations for Longshoring do not impose any duties upon, and are inapplicable to, shipowners. They apply only to stevedoring employers as more fully shown by a close examination of the Longshoremen's Act, the regulations and case law. Section 41 of the Longshoremen's Act, concerning Safety Rules and Regulations, states:

> (a) Every employer shall furnish and maintain employment and places of employment which shall be reasonably safe for his employees in all employments covered by this chapter and shall install, furnish, maintain, and use such devices and safeguards with particular reference to equipment used by and working conditions established by such employers as the Secretary may determine by regulation or order to be reasonably necessary to protect the life, health, and safety of such employees, and to render safe such employment and places of employment, and to prevent injury to his employees.

33 U.S.C. § 941(a) (1970). The term "employee," however,

> does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

33 U.S.C.A. § 902(3) (1976 Supp.). When a stevedore is hired as an independent contractor to load and/or unload a vessel, its longshoremen/employees are not employees of the vessel. In the normal situation, the only employees of the vessel present while longshoring operations are in progress are members of the ship's crew. These individuals, however, are not "employees" within the meaning of the Longshoremen's Act. Since the "term 'employer' means an employer any of whose employees are employed in maritime employment," 33 U.S.C. § 902(4) (1970), a vessel is not an "employer" within the meaning of the Act unless it hires longshoremen directly, bypassing an independent contractor.

This proposition was recognized by the Labor Department when it promulgated the Safety and Health Regulations for Longshoring pursuant to the Act. The relevant parts of the Regulations state:

> § 1918.2 *Scope and responsibility.*
>
> (a) The responsibility for compliance with the regulations of this part is placed upon "employers" as defined in § 1918.3(c).
>
> (b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.
>
> § 1918.3 *Definitions.*
>
> . . . .
>
> (c) The term "employer" means an employer any of whose employees are employed, in whole or in part, in longshoring operations or related employments, as defined herein within the Federal maritime jurisdiction of the navigable waters of the United States.

29 C.F.R. §§ 1918.2-.3 (1976).

Despite the foregoing unambiguous statutory provisions, however, Petitioners nevertheless insist that the duty to enforce the regulations falls upon the shipowner, relying on *Arthur v. Flota Mercante Gran Centro Americana S.A.*, 487 F.2d 561 (5th Cir. 1973). Such reliance is misplaced. Since Arthur's injury occurred in 1969, the 1972 Amendments to the Longshoremen's Act were not governing. Furthermore, Arthur alleged both negligencce and unseaworthiness. In the period following *Seas Shipping Company v. Sieracki*, 328 U.S. 85 (1946),[2] the previously independent concepts of unseaworthiness and negligence became hopelessly confused and intertwined. One post-Amendment decision issued a caveat concerning this very problem: "Pre-amendment cases . . . must be read with care, as they often reflect the rationale of the warranty of seaworthiness even when talking in terms of a negligence standard." *Ramirez v. Toko Kaiun K.K.*, 385 F. Supp. 644, 653 (N.D. Cal. 1974). This notorious confusion in cases decided between 1946 and 1972 militates against reliance on any case which, like *Arthur*, was decided without reference to the 1972 Amendments to the Longshoremen's Act.

4. THE DECISION BELOW DOES NOT CONFLICT WITH THE FOURTH CIRCUIT'S EARLIER DECISION IN *BESS v. AGROMAR LINE*, 518 F.2d 738 (4TH CIR. 1975).

Petitioners urge this Court to read into the *Bess* case the notion that negligence standards were unchanged by the 1972 Amendments. Such a suggestion is patently inaccurate. There are no reported decisions which disagree with the clear intent of Congress, as stated in the legislative history, that land-based standards are to be applied in measuring the duty now owed by shipowners to longshoremen. *See* The Report of the House Committee on Education and Labor, H.R. Rep.

[2] *Sieracki* extended the shipowner's warranty of seaworthiness to longshoremen.

No. 92-1441, U.S. Code Cong. & Ad. News, 92d Cong., 2d Sess. 4698, 4702-03 (1972) (hereinafter House Report). In fact, the Fourth Circuit in *Bess* explicitly adopted land-based standards. *See also Birrer v. Flota Mercante Grancolombiana,* 386 F. Supp. 1105 (D. Ore. 1974); *Ramirez v. Toko Kaiun K.K.,* 385 F. Supp. 644 (N.D. Cal. 1974); *Shellman v. United States Lines Operators, Inc.,* 1975 A.M.C. 362 (C.D. Cal. 1974), *rev'd on other grounds,* 528 F.2d 675 (9th Cir. 1975), *cert. denied,* 425 U.S. 936 (1976); *Citizen v. M/V TRITON,* 384 F. Supp. 198 (E.D. Tex. 1974); *Slaughter v. SS RONDE,* 390 F. Supp. 637 (S.D. Ga. 1974), *aff'd,* 509 F.2d 973 (5th Cir. 1975); *Fedison v. Vessel WISLICA,* 382 F. Supp. 4 (E.D. La. 1974); *Hite v. Maritime Overseas Corporation,* 380 F. Supp. 222 (E.D. Tex. 1974); *Lucas v. "Brinknes" Schiffahrts Ges. Franz Lange G.m.B.H. & Co., K.G.,* 379 F. Supp. 759 (E.D. Pa. 1974).

The *Bess* case was fully briefed to the Fourth Circuit below. Petitioners suggested then, as they do here, that the *Bess* footnote, 518 F.2d 738, 740n.5, called for application of pre-Amendment maritime negligence standards. Respondent replied then, as it does here, that *Bess* clearly adopted land-based standards. *Id.* at 741. In its decision below, the Fourth Circuit resolved this potential conflict by reaffirming land-based standards (Pet. App. 22a-23a) without any reference to pre-Amendment maritime cases. To interpret *Bess* as Petitioners now suggest would only revive a potential inconsistency already resolved once and for all by the Fourth Circuit.

5. THE DECISION BELOW IS IN ACCORD WITH THE MAJOR PRINCIPLES UNDERLYING THE 1972 AMENDMENTS.

In asserting that the Fourth Circuit's opinion "fails to conform to the principles announced by the drafters of the Amendments to the LHWCA" (Br. p. 12), Petitioners rely on the so-called "oil spill example" in the

legislative history. *See* House Report at 4704. In the district court below, Judge Kaufman forcefully and properly rejected any reliance on the example, which he found in total discord with the remainder of the legislative history. To allow recovery herein would, Judge Kaufman held, contravene land-based rules of negligence and open wide the door

> for the longshoremen to recover for shipowners' negligence on a basis that is not available against land or building owners to employees of independent contractors who do work on such land and/or in such buildings. . . . In that context, the possible or literal word-for-word application of one illustration in the House Report may not prevail.

Pet. App. 12a-13a. This is particularly true where, as in this case, the dangerous condition is created by the stevedore in the course of performing its contractual duties.

6. THE OPINION BELOW DOES NOT CREATE A DEFENSE BASED ON ASSUMPTION OF RISK.

Petitioners attack the "open and obvious" rule by stating that it is tantamount to adopting the doctrine of assumption of risk, which Petitioners correctly point out was rejected as a defense in the Committee reports. The attempt fails for two reasons.

First, Petitioners have totally ignored the essence of "assumption of risk." By its very nature, it is a *defense.* Dean Prosser, for example, includes the subject in his treatise in a chapter entitled "Negligence: Defenses." Prosser, *The Law of Torts* ch. 11, § 68 (4th ed. 1971). He described assumption of risk as follows:

> In its simplest and primary sense, assumption of risk means that the plaintiff, in advance, has given his consent to relieve the defendant of an obligation of conduct toward him. . . . The result is that the defendant is relieved of all legal duty to the plaintiff; and being under no duty, he cannot be charged with negligence.

Id. § 68, at 440.

The "open and obvious" rule does not relieve shipowners of any and all duty toward longshoremen. Rather, it simply recognizes the obvious fact that there is no point in requiring a landowner to warn an invitee about something which is perfectly apparent to the invitee. Thus, the landowner does not escape liability because the invitee has assumed the risk of the landowner's negligence, but rather because reasonable men would not warn business invitees on their property about obvious dangers. No duty has been breached. The Respondent in this case never suggested that, had it been found negligent, it would have nonetheless been entitled to escape liability because the Petitioners assumed the risk of harm, thus forefeiting all their rights. That is not the law. That does not mean to say, however, that the shipowner should thereby be held to a higher standard of care. The plain fact is the district court held that this Respondent was *not* negligent under post-Amendment standards, and the Fourth Circuit affirmed. That being the case it is irrelevant to consider an affirmative defense to negligence.

Second, to accept Petitioners' assertions would directly conflict with the reasoning of Judge Kaufman below, just discussed, that minor inconsistencies in the legislative history cannot overturn the obvious intent of the 1972 Amendments in adopting land-based standards. That, in effect, is what Petitioners now ask this Court to do, for the "open and obvious" standard is recognized as the rule defining the *duty* owed by landowners to business invitees. What Congress rejected was "the *defense* of assumption of risk." House Report at 4705 (emphasis added). Any technical inconsistency noted by Petitioners cannot override the clear intent of Congress.

7. *KERMAREC v. COMPAGNIE GENERAL TRANSATLANTIQUE*, 358 U.S. 625 (1959), HAS NO BEARING ON THIS CASE.

Petitioners contend that *Kermarec* dictates application of a more stringent duty than is owed under land-based standards. While it is doubted that the *Kermarec* standard is altogether inconsistent with the standard applied below, that question is completely moot. It is fundamental that federal statutes displace inconsistent substantive judicial principles. Therefore, when Congress adopted the 1972 Amendments to the Longshoremen's Act, it simultaneously rendered obsolete all prior cases setting forth inconsistent standards. Indeed, *Kermarec* recognized this very point, for after stating that the "issue must be decided in the performance of the Court's function in declaring the general maritime law, free from inappropriate common-law concepts," 358 U.S. at 630, Mr. Justice Stewart, writing for the unanimous Court, added in a footnote *"[w]here there is no impingement upon legislative policy." Id.* at 630n.5 (emphasis supplied).

The 1972 Amendments to the Longshoremen's Act provide the sole remedy for longshoremen injured on board vessels. The duty owed by such vessels is measured by the standards adopted in the statute. No pre-Amendment case inconsistent with those standards, even though decided by the highest court of the land, can be properly cited as the controlling rule of law.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

STATEMENT OF THE FACTS
(Taken from Brief of Appellants [Petitioners herein] filed in Court of Appeals for the Fourth Circuit)

The following statement of the facts, which in some instances goes beyond the actual evidence adduced at the trial (e.g., certain particulars of the vessel from Lloyd's Register of Ships) is an agreed statement by the parties to this appeal.

The accident which is the subject matter of this litigation occurred on February 18, 1973 in the No. 1 lower hold of the M/V TARPONA, owned and operated by Dynamic Mariners Corp. The TARPONA was built in Kobi, Japan, in 1951. Her length overall is 473′ 5″; her extreme breadth is 61′ 8″. She is a general cargo vessel of 8,068 gross tons, 4,490 net tons, with six holds served by six hatches. She was of Panamanian registry; her crew was Chinese (Lloyd's Register of Ships; App. 2; 25; 43).

The cargo spaces in the vessel's No. 1 hatch consisted of an upper tween deck, lower tween deck and lower hold. At the main, or weather, deck level the hatch was covered by folding MacGregor hatch covers (Defendant's Exhibit 1-D, App. 31); at the upper and lower tween deck levels, the hatch coverings consisted of fore and aft hatch boards resting on four athwartships beams weighing approximately one ton each. (Court's Exhibit No. 1, App. 22; Defendant's Exhibits 1-A and 1-C, App. 23 and 24; App. 25; 28-29; 52). The hatchway, or opening, at the main deck level was 19′ in length, 20′ in width (Lloyd's Register of Ships).

In Keelung, Taiwan, the TARPONA had loaded a full cargo for discharge in various ports. Prior to arrival in the Port of Baltimore, she had discharged cargo in the Port of New York on February 15, 1973, from her No. 1 upper tween deck. The discharging stevedore in New York was Maher Terminals, Inc., which is neither connected nor affiliated with the discharging stevedore

in Baltimore, Nacirema Operating Co., Inc. Upon sailing from New York for Baltimore, the vessel's No. 1 upper tween deck was empty.

The TARPONA anchored in Baltimore Harbor at 1822 hours, February 16, 1973, preparatory to discharging the Baltimore cargo which, in her No. 1 hatch, was all contained in the lower tween deck and lower hold. She departed from the anchorage at 0655 hours on February 17, 1973, and proceeded to dock at the west side of Pier 9, Locust Point, Port of Baltimore, at 0734 hours (App. 2; 25; 26; February 17 hatch report, Defendant's Exhibit 4, Tr. 9; stowage plan, Defendant's Exhibit 6, Tr. 9; vessel's long abstract, Defendant's Exhibit 7, Tr. 9).[3]

On February 17, 1973, gang carrier John Brokos and 23 longshoremen, all employees of Nacirema Operating Co., Inc., boarded the TARPONA at 0800 hours and proceeded to the No. 1 hatch where they rigged and uncovered until 0830 hours when the actual discharging of cargo commenced. Both appellants Anuszewski and Gutowski were members of Brokos' gang and, with certain other members of the gang, participated in the rigging and uncovering operation. There is some question as to whether the longshoremen found the hatch open at the main deck level upon arrival aboard the vessel, or whether they themselves actually opened the MacGregor hatches in order to gain access to the hatch; however, the resolution of the question is immaterial since it is undisputed that the members of the gang did enter the upper tween deck and removed the hatch boards in the square of the hatch in order to gain access to the Baltimore cargo in the lower tween deck and, subsequently, the lower hold (App. 2; 25-26; 28; 46-48; 51; February 17 hatch report, Defendant's Exhibit 4, Tr. 9).

When the longshoremen had removed the hatch boards at the upper tween deck level in order to gain access to the Baltimore cargo in the lower tween deck,

[3] Reference to pages of the Appendix are (App. followed by page numbers) reference to pages of the Transcript not reproduced in the Joint Appendix are (Tr. followed by the page number).

they noted that there were four athwartships hatch beams at the upper tween deck level. These beams, although equipped for locking devices consisting of pins similar to 6" threaded bolts and nuts, were not locked in the slots into which they fit nor were they otherwise secured in any manner (see photographs, Defendant's Exhibits 1-A and 1-C, reproduced in the Appendix at pp. 23 and 24). Neither locking devices, nor rope for lashing, was in the immediate vicinity of the unsecured beams. Upon orders of the gang carrier and ship foreman, both stevedore employees, the winchman, likewise a stevedore employee, removed the three aftermost hatch beams, leaving the forward beam in place.

The longshoremen had discussed the absence of any means of securing the beams in place among themselves and had, in fact, complained to their gang carrier and ship foreman, both stevedore employees. The stevedore's safety man was not aboard. The ship foreman told the men to continue to work and that the situation would be corrected; however, throughout February 17 and February 18 until the time of the accident, the situation was not corrected and the forward beam in the lower tween deck was never secured in place in any manner (App. 3-4, 33, 42, 50, 53).

On February 17, 1973, the gang members discharged all of the cargo from the lower tween deck. Later the same day, they proceeded to remove the hatch covers from the lower tween deck hatch square in order to discharge cargo from the lower hold. Again, there were four athwartships hatch beams in place similarly unsecured in the slots in which they rested. Again, the three aftermost beams were removed by the winchman and the forward beam was left in place. The longshoremen then proceeded to discharge some of the cargo from the lower hold and completed work that day at 5:00 P.M. after having discharged a total of 85 tons of cargo from the lower tween deck and lower hold.

On February 18, 1973, the same gang of longshoremen returned to the TARPONA and continued to discharge the cargo from the vessel's No. 1 lower hold. Work commenced at 8:00 A.M. and continued through-

out the day until all cargo was discharged from the lower hold by 3:30 P.M. In the meantime, however, at 9:50 A.M. while a pallet was being discharged from the lower hold, the cargo hook which was attached to the ship's fall caught beneath the forward beam in the lower tween deck, dislodged it, and caused it to fall approximately ten (10) feet into the vessel's lower hold striking Gutowski and Anuszewski (App. 2-3; 25-26; 28-30; 33-35; 42; 46-47; 52-54; 67; February 17 and 18 hatch reports, Defendant's Exhibits 4 and 5, Tr. 9; Stowage Plan, Defendant's Exhibit 6, Tr. 9; vessel's log abstract, Defendant's Exhibit 7, Tr. 9).

There was a Nacirema gear locker within a half block of the vessel where rope, and probably nuts and bolts, could have been obtained for use in fastening the beams in place. There was a nearby chain locker aboard the vessel which contained items which could have been used to fasten the beams in place. A member of the ship's crew was present in the No. 1 hatch on February 17 and February 18 for the purpose of preventing pilferage. Also, other members of the crew and ship's officers were in the vicinity of the No. 1 hatch and were able to see that the beams were not secured. No one from the vessel was asked to correct the situation (App. 4, 33, 35-38, 44, 53, 66).